Supreme Court, U.S.
FILED
SEP 15 2003
OFFICE OF THE CLERK

No. 02-1290

IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
and ARTHUR WAH,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the United States Postal Service, an independent establishment of the executive branch that Congress has authorized to engage in commercial pursuits and to sue and be sued in its own name, is amenable to suit as a "person" under the federal antitrust laws.

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Respondent, Flamingo Industries (U.S.A.) Ltd., was set forth at page II of the Brief in Opposition, and there are no amendments to that statement.

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President's Commission on the United States Postal Service, *Embracing the Future* (July 31, 2003) 23, 25, 34
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Ann Marie Hauck Walsh, *The Public's Business The Politics and Practices of Government Corporations* (MIT Press 1978)..... 22, 23

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals is reported at 302 F.3d 985 (Pet. App. 1a-22a). The opinion of the district court is unreported (Pet. App. 23a-27a).

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. A petition for rehearing with suggestion for rehearing *en banc* was denied on November 4, 2002 (Pet. App. 28a-29a). The United States Postal Service filed a petition for a writ of certiorari on March 4, 2003, and the petition was granted on May 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8 of the Sherman Act, 15 U.S.C. § 7, provides in relevant part:

> The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Section 1 of the Clayton Act, 15 U.S.C. § 12, provides in relevant part:

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Other relevant statutory provisions are reproduced in the statutory appendix, infra App. 1a- 7a.

STATEMENT

Respondents Flamingo Industries and its owner, Arthur Wah, filed suit in the United States District Court for the Northern District of California against petitioner, the United States Postal Service (USPS), for antitrust and other injuries stemming from petitioner's termination of a contract with Flamingo to produce U.S. mail sacks. Respondents alleged under the Sherman and Clayton Acts that petitioner attempted to suppress competition and create a monopoly in mail sack production. Respondents further contended that petitioner manipulated requirements for the sacks in an effort to award a contract to a favored vendor, even though the mail sacks of the other vendors were of inferior quality and posed an environmental risk to postal service

employees. Respondents also alleged injuries arising out of petitioner's violation of its own procurement regulations; argued that the USPS's conduct violated the implied covenant of good faith and fair dealing; and asserted violations under California Business and Professions Code § 17200.

The district court granted petitioner's motion to dismiss on all claims, reasoning in relevant part that Congress did not intend to impose antitrust liability on petitioner. Pet. App. 23a-24a. The court dismissed respondents' non-antitrust claims for lack of venue. *Id.* at 26a.

The United States Court of Appeals for the Ninth Circuit reversed in part, holding that petitioner, as a "person," is subject to the federal antitrust laws. To reach that result, the court followed the framework set out in *FDIC v. Meyer*, 510 U.S. 471 (1994). First, the court "consider[ed] whether 39 U.S.C. § 401(1)" – the provision establishing that petitioner can sue and be sued – "operates as a waiver of the Postal Service's sovereign immunity." Pet. App. 4a. Relying on this Court's decisions in *Franchise Tax Board v. USPS*, 467 U.S. 512 (1984), and *FHA v. Burr*, 309 U.S. 242 (1940), the court noted "the general presumption that a sue-and[-]be-sued clause should be liberally construed." *Id.* at 5a. Given that Congress had "indicated that it wished the Postal Service to be run more like a business than had its predecessor," *id.* (quoting *Franchise Tax*, 467 U.S. at 519-20), and that Congress had launched the Postal Service into the commercial world," *id.* (quoting 467 U.S. at 520), the court held that Congress intended the waiver of sovereign immunity under the Postal Reorganization Act to be broad. *Id.* at 8a.

The court of appeals next "turn[ed] to the second inquiry" under *Meyer*, namely "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.* (quoting *Meyer*, 510 U.S. at 484). The court noted that "[t]he source of substantive law upon which Flamingo relies is

federal antitrust law," and reasoned that, "[b]ecause the Postal Service is an entity with the status of a commercial enterprise, it fits within the common meaning of the word 'person,' or 'persons,' wherever used in [Title 15 of the United States Code]." *Id.* at 11a. Indeed, the court noted that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Id.* at 10a. The court distinguished *United States v. Cooper Corp.* , 312 U.S. 600 (1941), on the ground that, although a "person" under the antitrust laws does not include the United States, it may include federal entities whose sovereign immunity has been waived. *Id.* Thus, petitioner "fits within the common meaning of the word 'person,' just as does any other private corporation." *Id.* at 11a.

The court stated that petitioner nonetheless could assert "conduct-based" immunity from antitrust liability if it acted "at the direction of a federal sovereign." It explained that: "Accordingly, our holding that the Postal Services does not enjoy status-based immunity does not prevent the Service from asserting conduct-based immunity if the action of the Postal Service being challenged was taken at the command of Congress." *Id.* at 13a.

In addition, the court reinstated the procurement manual claim, *id.* at15a-16a, but affirmed dismissal of a related tort claim because respondents had failed to exhaust available remedies under the Federal Tort Claims Act. *Id.* at 16a-17a. Finally, the court held that the claim under the California Business & Professions Code was preempted by federal law, principally because the standard of review of Postal Service procurement decisions is more deferential under federal law than it would be under California law. Pet. App. 19a-20a.

SUMMARY OF ARGUMENT

In the antitrust laws, Congress provided for suit against any "person" causing antitrust injury. Congress defined the term expansively to "include" "corporations and associations existing under or authorized by the laws of . . . the United States." 15 U.S.C. §§ 7, 12(a). Although this Court in *United States v. Cooper Corp.* , 312 U.S. 600 (1941), excluded the United States itself from the term "person," it subsequently construed the term "person" broadly to apply to both state and foreign governmental entities. *Georgia v. Evans*, 316 U.S. 159 (1942); *Pfizer, Inc. v. Government of India* , 434 U.S. 308 (1978). These decisions are consistent with Congress's intent that, with the narrow exception in *Cooper*, the federal antitrust laws should extend to reach as much anti-competitive behavior as possible. This Court has "repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

This Court has long recognized the distinction between the United States and governmental entities engaged in commerce that can sue and be sued in their own name. *Pierce v. United States*, 314 U.S. 306 (1941); *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81 (1941). Congress enacted the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, to transform the former Post Office Department into an "independent establishment of the executive branch" so that the new entity, the USPS, would "be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board v. USPS*, 467 U.S. 512, 519-20 (1984).

To that end, Congress made the Postal Service more independent of executive branch control, authorized it to compete in the commercial marketplace, and freed the USPS from many government-wide political restraints – such as the Administrative Procedure Act and federal procurement laws –

to enable it to compete more vigorously with private firms. Thus, although the United States does not generally fall within the statutory definition of "person," Congress's designation of the USPS as an independent establishment, its enactment of a sue-and-be-sued clause, and its determination that the USPS compete in the marketplace manifest its intent that petitioner be included within the statutory term "person" under the antitrust laws, just as are state and foreign governmental entities.

ARGUMENT

THE UNITED STATES POSTAL SERVICE FALLS WITHIN THE STATUTORY DEFINITION OF "PERSON" UNDER THE FEDERAL ANTITRUST LAWS AS AN INDEPENDENT ESTABLISHMENT OF THE EXECUTIVE BRANCH ENGAGING IN COMMERCIAL ACTIVITIES WHOSE IMMUNITY HAS BEEN WAIVED BY CONGRESS

Congress intended that the federal antitrust laws apply broadly to all "persons," including governmental entities other than the United States itself. Congress under the Postal Reorganization Act created such a "person" in launching the independent Postal Service into the commercial world, in exempting it from many government-wide rules and regulations, and in authorizing it to sue and be sued in its own name. Petitioner's analysis to the contrary ignores the plain language of the antitrust laws, their underlying goal of preventing the evil of monopolistic behavior, the plain language of the PRA's creation of a distinct commercial entity, and the PRA's underlying purpose of placing the USPS on a competitive footing with private entities in the marketplace.

A. Congress Intended "Person" Under The Federal Antitrust Laws To Be Construed Expansively To Prevent Monopolistic Behavior

Congress created a cause of action for victims of antitrust violations in Section 4 of the Clayton Act. *See* 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property . . . may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . "). Congress used the term "person" in defining who could sue under that cause of action, but did not use that term to identify who could be sued. Some of the substantive antitrust provisions impose obligations only on "[e]very person," 15 U.S.C. § 2 (Section 2 of Sherman Act), or "any person," 15 U.S.C. § 13 (Section 2 of Clayton Act). Section 1 of the Sherman Act, by contrast, simply provides that "[e]very contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce" is illegal. 15 U.S.C. § 1.

There has been no suggestion, however, that by not using the term "person," either Section 4 of the Clayton Act or Section 1 of the Sherman Act applies more broadly than its neighboring provisions. Rather, Congress's omission of the term "person" in those sections highlights the intended breadth of the anticompetitive behavior that Congress wished to deter in all of the federal antitrust laws. "Person" in the context of the antitrust laws is not a term of limitation. Indeed, Congress defined "person" to "include corporations or associations existing under or authorized by the laws of . . . the United States." 15 U.S.C. §§ 7, 12(a). Congress's use of the term "include" in its definition of "person" signifies its intent that a wide variety of entities fall within the scope of the antitrust laws. As this Court stated in *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941), the term "includes"

"connotes simply an illustrative application of the general principle," in this case that "person" apply extensively. *See also American Surety Co. v. Marotta*, 287 U.S. 513, 517 (1933). Congress intended the federal antitrust laws to be applicable broadly to encompass all types of entities.

Despite the plain language, petitioner argues that this Court's decision in *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941), dictates a far narrower construction of the term "person." It asserts that, because the Court held that Congress did not intend to include the United States within the term "person" as used in the antitrust laws, all federal entities should similarly be exempt. Petitioner's claim simply ignores the reasoning in *Cooper*.

In *Cooper*, this Court stated that, as a matter of structure, the statute's use of the generic term "person" in the treble damages section should not be read to cover the United States given that the statute explicitly authorized the United States to sue for injunctive relief and criminally prosecute wrongdoers. *Id.* at 612-13. The Court went on to note that, in each place in the statute where the term "person" is used, "it is obvious that while the term 'person' may well include a corporation, it cannot embrace the United States." *Id.* This structural argument applies solely to the United States as sovereign.

Moreover, as a matter of understanding the specific language in the statute, this Court noted that, even if the United States could qualify as a corporation, the argument that the "United States may be treated as a corporation organized under its own laws . . . seems so strained as not to merit serious consideration." *Id.* at 607. In dissent, Justice Black noted that the majority opinion implied that government corporations, in contrast to the United States itself, would fall within the statutory definition of "person." *Id.* at 615 n.1. Such governmental entities could be construed to be "corporations or associations existing under or authorized by the laws of . . . the

United States." There is no linguistic barrier to suit when a distinct government entity is a litigant. Indeed, the United States in its brief before this Court in *Cooper* stated that the definition of person "admittedly covers a corporation organized under an Act of Congress. The Tennessee Valley Authority, the Reconstruction Finance Corporation, the Smithsonian Institution, and any other federal corporation. . . ." Brief for United States at 32, *United States v. Cooper Corp.*, 312 U.S. 600 (1941) (No. 484).[1]

Cooper, therefore, narrowly applies to the United States. Only the United States can sue for other remedies in the Act, and only the United States under ordinary conventions of language falls outside the requirement of being a "corporation[] or association[] existing under or authorized by the laws of...the United States."

Three additional considerations strongly support an expansive definition of "person." First, subsequent rulings by this Court have explicitly held that Congress intended "person" under the antitrust laws to be broadly construed. Congress intended the antitrust laws to restrain anticompetitive acts of both a public and private nature. One year after *Cooper*, this Court held that states must be considered persons under the antitrust laws, see *Georgia v. Evans* , 316 U.S. 159 (1942). There, this Court described its holding in *Cooper* as not based on any interpretation of "the word 'person' abstractly considered." *Id.* at 161. Rather, interpretation of the word 'person' or

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[1] Congress in 1955 amended the Clayton Act to permit the United States to sue for actual damages under the antitrust laws, 69 Stat. 282, and then for treble damages in 1990, 104 Stat. 2880. In neither case did Congress address the possibility of suit against independent establishments or any other type of federal entities that could sue and be sued. Given that such entities can be "persons" under the antitrust laws, Congress's failure to clarify the scope of the antitrust laws in this respect is not surprising.

'corporation' depends upon its legislative environment." *Id.* *See also Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887, 1893 (2003) ("qualification of a sovereign as a 'person'" depends "on the legislative environment in which the word appears") (citations omitted); *Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (reiterating that "[w]hether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found"). Because states, unlike the federal government, could not sue for injunctive relief or seek criminal sanctions, this Court concluded that Congress intended their inclusion within the statutory term "person." *Georgia v. Evans*, 316 U.S. at 162-63.

In *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), this Court subsequently held that the statutory term "person" under the antitrust laws includes a foreign nation and therefore permitted the Government of India to maintain suit. [2] This Court also noted that "Congress used the phrase 'any person' intending it to have a naturally broad and inclusive meaning," *id.* at 312, and that "the Sherman and Clayton Acts did not create a 'hard and fast rule of exclusion' of governmental bodies," *id.* at 315 (citation omitted). The touchstone for understanding "person" was "the legislative environment,"

[2] This Court reiterated the reasoning that it had provided in *Georgia v. Evans*, namely that *Cooper* only precluded the United States from being considered a "person" in light of the other remedies provided in the Act. Indeed, the United States at that time similarly was of the view that the "rationale of *Cooper* was that because Congress had given the United States other remedies for enforcing the antitrust laws, it did not intend the government also to be able to sue for treble damages." Memorandum of Amicus Curiae United States at 9, *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (No. 76-749).

which called for an expansive definition of "person."[3]

Pfizer and *Georgia v. Evans* construed "person" broadly in the context of enabling a governmental entity to sue for antitrust injury. *Cooper* already had made clear, however, that "person" should be construed to have the same meaning in the provisions relating to plaintiffs as in those relating to defendants: "It is hardly credible that Congress used the term 'person' in different senses in the same sentence." 312 U.S. at 606. Accordingly, this Court has held that state agencies also can be sued for antitrust injury. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983) (applying the Clayton Act to purchases by state hospitals); *cf. City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 395 (1978) ("the definition of 'person' or 'persons' embraces both cities and States," whether as plaintiffs or defendants). Moreover, the United States Department of Justice has construed the antitrust laws to permit suits against foreign governmental entities for antitrust violations: "As a practical matter, most activities of foreign government-owned corporations operating in the commercial marketplace will be subject to U.S. antitrust laws." *United States Department of Justice Antitrust Enforcement, Guidelines for International Operations* 3.31 (April 1995).

Second, even prior to *Cooper*, this Court already recognized

[3] Petitioner (Br. at 8-9) mistakenly relies on *International Primate Prot. League v. Tulane Educ. Fund*, 500 U.S. 72 (1991), for the proposition that "when Congress excludes a sovereign from the statutory term 'person,' it equally excludes agencies and instrumentalities of the sovereign." Aside from the fact that – as we will discuss – Congress has designated petitioner to be neither an agency nor an instrumentality, the Court in *International Primate* relied principally on the specific wording in the removal statute that would have made it awkward to include an agency within the term "person," *id.* at 79-80, much as the Court concluded in *Cooper* with respect to the United States, 312 U.S. at 607.

that the term "person" in the antitrust laws included entities with a public rather than private character. In *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U.S. 396, 410 (1889), the Court stated that "combinations among those engaged in business impressed with a public or quasi-public character, which are manifestly prejudicial to the public interest, cannot be upheld." Subsequently, in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 321-22 (1897), the Court reiterated that Congress intended the antitrust laws to apply to entities that serve the public as well as private interest:

> It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations...But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct.

The Court therefore held that the public corporation, which was vested with the power of eminent domain, was a "person" under the Act. As the Court stressed three years after *Cooper* in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), "Language more comprehensive [than in the federal antitrust laws] is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse." To that end, this Court has "repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Goldfarb v. Virginia State Bar*, 421 U.S. at 787. Thus, this Court has embraced as broad a construction of "person" as possible, excluding only the sovereign United States itself.

Third, at the time of *Cooper*, courts frequently distinguished between the United States and federal governmental entities

that had distinct identities. The Supreme Court's decision in *Pierce v. United States* , 314 U.S. 306 (1941), decided in the same year as *Cooper*, is instructive. There, the United States charged an individual with impersonating an official of the Tennessee Valley Authority (TVA). The pertinent statute, passed in the era of the Sherman Act, prescribed penalties for those who "falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department." 18 U.S.C. § 76. This Court set aside the penalty, reasoning that impersonating an officer of the TVA, an entity designated "an instrumentality and agency of the Government of the United States," represented a different offense: "The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States." *Id.* at 310. *See United States v. Strang*, 254 U.S. 491 (1921) (arriving at a similar conclusion with respect to officer of United States Shipping Board Emergency Fleet Corp.). To the Court, the generally understood distinction between the United States and sue-and-be-sued entities such as government corporations was clear.[4]

Two months prior to *Cooper*, this Court considered whether another sue-and-be sued entity – the Reconstruction Finance Corporation (RFC) – could be subject to costs in a suit to enjoin infringement of trademarks. *Reconstruction Finance Corp. v. J.G. Menihan Corp.*, 312 U.S. 81 (1941). The Court concluded that the federal entity should be subject to costs, principally

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[4] *See also Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922) (holding that the United States Shipping Board Emergency Fleet Corporation, which the Court termed an "instrumentality of the Government of the United States," could not be treated as the "United States" for purposes of Court of Claims jurisdiction and for purposes of a bankruptcy statute).

because "[w]hile it acts as a government agency in performing its functions . . . still its transactions are akin to those of private enterprises." *Id.* at 83. Further, "the unqualified authority to sue and be sued placed [the RFC] upon an equal footing with private parties." *Id.* at 85. Thus, at the time of *Cooper*, this Court treated the United States and independent federal entities that could sue and be sued in their own name quite differently.

That distinction also was evidenced in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), which addressed whether a Regional Agricultural Credit Corporation, chartered by the RFC, could be subject to a negligence suit arising out of an alleged breach of contract. Even though Congress had not included a sue-and-be-sued clause in creating the Regional Agricultural Credit Corporation, this Court held that Congress nonetheless had intended the governmental entity to be subject to suit – "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Id.* at 390. The Court further explained that, "[b]ecause of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for government ends." *Id.* It went on to note that Congress had waived the immunity for almost all governmental corporations, and that "[s]uch a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor." *Id.* at 390-91. The Court concluded that, in light of Congress's decision to make the RFC amenable to suit, it likely intended that its subsidiary, the Regional Agricultural Credit Corporation, would similarly be subject to suit under generally worded contract and tort actions. *Id.* at 394. Accordingly, the Court permitted the common law contract action to proceed.

In sum, in *Pierce*, *J.G. Menihan*, and *Keifer & Keifer*, this Court recognized the distinct nature of governmental entities that engage in commercial transactions and can sue and be sued. In those opinions, the Court stressed the different identities and obligations of those governmental entities that Congress had directed to act more in line with entities in the private sector. Thus, the Court that decided *Pierce* and the two RFC cases would not likely have considered its exclusion of United States from the term "person" to apply to other governmental entities of a different character.

Several lower courts similarly have concluded that the TVA – an "instrumentality and agency of the United States," 16 U.S.C. § 831r, whose immunity has been waived by Congress -- falls within the statutory term "person" in the federal antitrust laws. *In re Uranium Industry Antitrust Litigation*, 458 F. Supp. 1223 (J.P.M.L. 1978); *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D. Pa. 1962). The courts agreed with the TVA that its distinct identity suggested that it should be able to sue in its own name for antitrust injuries. Because Congress intended the TVA to stand on a footing separate from that of the United States, the courts permitted the TVA to sue as a "person" under the antitrust laws: "If we are to read the statutory language in its 'ordinary and natural sense,' as we are enjoined in *Cooper*, it would appear incontestable that TVA is a 'person' within the meaning" of the Act. *General Electric*, 209 F. Supp. at 203.

Moreover, pursuant to this Court's reasoning in *Georgia v. Evans*, given that the TVA cannot obtain alternative remedies such as criminal sanctions, then it is only logical to assume that Congress intended to include it as a "person" within the

meaning of the federal antitrust laws. [5] Concluding that the TVA was a "person" under the antitrust laws allowed it to sue in its own name and thus vindicate its interests independent of any action of the United States.

Instead of focusing on the pertinent language in the antitrust laws or on the reasoning in *Cooper*, *Georgia v. Evans*, and *Pfizer*, petitioner stresses (Br. at 9-10) the lower court decisions holding that federal agencies and instrumentalities that cannot be sued in their own name do not fall within the statutory term "person" under the antitrust laws. *See, e.g.*, *Sea-Land Serv. Inc. v. Alaska R.R.* , 659 F.2d 243 (D.C. Cir. 1981) (Alaska Railroad and its supervising United States agencies); *Jet Courier Servs., Inc. v. Federal Reserve Bank* , 713 F.2d 1221 (1983) (Federal Reserve Banks); *Rex Systems, Inc. v. Holiday*, 814 F.2d 994 (4th Cir. 1987) (Department of the Navy); *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985) (Southeastern Power Administration); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980) (Army and Air Force Exchange Service). Those decisions, however, neither address the status of the Postal Service nor focus on (or even discuss) whether a governmental entity that Congress has vested with a distinct identity, substantial independence, and the power to sue and be sued should similarly be considered a "person" within the meaning of the federal antitrust laws.

To this point, respondents have demonstrated that Congress intended "person" in the federal antitrust laws to be understood broadly. Although*Cooper* excluded the United States from the reach of "person," the reasoning in *Cooper*, as well as decisions such as *Georgia v. Evans*, *J.G. Menihan*, and *South-Eastern*

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[5] *But see Webster County Coal Corp. v. TVA*, 476 F. Supp. 529, 532 (W.D. Ky. 1979) (holding that the TVA, "as an agency and instrumentality ofthe federal government, is exempt from liability under the antitrust laws").

Underwriters Ass'n immediately thereafter, reveal the narrowness of the *Cooper* decision. Congress sought to reach anticompetitive conduct irrespective of whether the conduct could be considered private or public. We show below that Congress in creating the USPS under the Postal Reorganization Act in 1970 intended the USPS to be the type of entity that – like state and foreign governmental entities – falls within the statutory definition of "person."

B. The "Independent Establishment" Of The USPS Created By The Postal Reorganization Act Is A "Person" Under The Antitrust Laws

Through the Postal Reorganization Act, Congress dramatically altered the status of the former Post Office Department. First, it granted the USPS far more independence than its predecessor, the United States Post Office, had enjoyed. Second, it launched the USPS into the commercial world, authorizing it to compete with private firms in the marketplace. Third, it freed the USPS from many of the administrative constraints facing other federal entities so that it could compete more effectively in the marketplace. Finally, it provided the USPS with a distinct identity, directing that it could sue and be sued in its own name. Taken together, these factors convincingly demonstrate that petitioner is a "person" within the meaning of the federal antitrust laws.

Petitioner devotes much of its brief to the uncontested proposition that the new USPS must be viewed as part of the federal government. The critical question, however, is not whether the USPS is governmental, but whether its independence, distinct status, and unique characteristics reflect Congress's determination that the USPS is the type of entity that, like state and foreign governmental entities, falls within the scope of the antitrust laws as a "person."

1. Creation of the USPS as an Independent Establishment

Congress designated the USPS as "an independent establishment of the executive branch," 39 U.S.C. § 201, eschewing the terms agency or instrumentality. Indeed, petitioner in its brief frequently misstates the designation, variously calling it an "agency,"[6] an "instrumentality" and an "establishment." Br. at 6, 10, 24, 31, 33. Congress designated the USPS as an "independent establishment of the executive branch," not an agency, not an instrumentality, and not **in** the executive branch.[7] Congress's wording highlights its intent that

[6] Despite the USPS's contention here, it has argued elsewhere that the Postal Service should not always be considered a federal agency. For instance, in *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071 (Fed. Cir. 2001), the USPS had argued that it was not subject to Court of Federal Claims jurisdiction because it was not a federal agency as specified under the Administrative Dispute Resolution Act of 1996 (ADRA), 28 U.S.C. § 1491(b)(1). Petitioner itself therefore has urged that terms like "agency" or "instrumentality" refer to different entities depending on the context. *See also* Brief of Amicus Curiae United States at 21, *Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821 (1997) (No. 95-918) ("Numerous cases in the lower courts have recognized that an entity may be a 'federal instrumentality' for some purposes but not others.")

[7] Congress has not conferred similar powers on all "independent establishments of the executive branch." The term "independent establishment" – like agency or instrumentality – does not have any set meaning. Congress intended most independent establishments to operate with little direct control from the executive branch. To take one example, Congress in 2000 created the Vietnam Education Foundation as an independent establishment of the executive branch. It established a thirteen-member Board of Directors that included three executive branch officials, six non-governmental individuals "who have academic excellence or experience in the fields of concentration," two members of the House of Representatives, and two members of the Senate. 22 U.S.C. § 2452. No provisions specifying how the officials could be removed from office were included.

petitioner be granted a unique governmental status.[8]

The PRA's structure also plainly manifests the USPS's unique independence. Congress in the PRA removed the Postmaster General from a position within the President's cabinet. Instead, Congress directed the President to appoint nine governors of the USPS, who can only be removed for cause. 39 U.S.C. § 202. Congress vested in the governors – not the President – the exclusive power to hire and fire the Postmaster General at will. 39 U.S.C. § 202(a). As the D.C. Circuit has stressed, "the Board of Governors was to have policy control with functions similar to a board of directors" and be "independent of ordinary legislative and executive control." *Mail Order Ass'n of America v. USPS*, 986 F.2d 509, 519 (D.C. Cir. 1993) (citations omitted). The Postal Service's new structure reveals its separation from the President and

[8] Indeed, in defining federal governmental organizations, Title V of the United States Code treats the Postal Service differently than other federal entities. Congress first defined executive departments in 5 U.S.C. § 101, which does not include the Postal Service, defined military departments in Section 102, and then included governmental corporations in Section 103. In Section 104, Congress defined "independent establishment" to mean "an establishment in the executive branch (other than the United States Postal Service . . .) which is not an Executive Department, Military Department, Government Corporation or part thereof." And, in Section 105, Congress defined "executive agency" as "an executive department, a Government corporation , and an independent establishment." The Postal Service uniquely falls outside all of those definitions in Title V, and courts have relied on that omission in holding that certain broadly applicable government rules do not apply to the Postal Service. *See, e.g.*, *Kane v. MSPB*, 210 F.3d 1379 (Fed. Cir. 2000) (addressing a former version of the Hatch Act); *Cooper v. USPS*, 2001 U.S. Dist. LEXIS 19259 (N.D. Ill) (holding that 5 U.S.C. § 5545a not applicable to Postal Service investigators); *Hayes v. United States*, 20 Cl. Ct. 150 (1990) (holding that 5 U.S.C. § 4503 is not applicable to USPS employees).

conventional political controls.

The PRA freed the USPS from bureaucratic reins as well. As the USPS asserts in its brief (at 25), the PRA minimized "direct political supervision" of the Postal Service and instilled it with "greater bureaucratic independence." The Board of Governors, not Congress, was to assume operational control. As the USPS further (at 13) explains, "Congress could no longer manage such administrative details itself." The Postal Service thus enjoys greater autonomy than most other federal governmental entities.

Congress left the USPS well equipped to exercise that autonomy. It granted to the USPS the powers, among other authorities, "to enter into and perform contracts, execute instruments and determine the character of and necessity for, its expenditures," 39 U.S.C. § 401(3), "to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents," *id.* § 401(4), and "to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it" *id.* § 401(6).

In other circumstances, the USPS successfully asserted that it is not the United States. For example, although "[c]opyright protection is not available for any work of the United States Government," 17 U.S.C. § 105, the USPS has sought copyright protection for hundreds of works it has registered through the U.S. Copyright Office. U.S. Copyright Office, "Books, Music, etc." database (Sept. 9, 2003) (search for registered works where "United States Postal Service" is listed as claimant yielded 325 results), http://www.copyright.gov/records/. Indeed, one court previously differentiated the USPS from the United States in the context of an antitrust suit. In *United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978), the United States brought suit under the Sherman Act against AT&T. The defendant sought to discover documents in the

possession of the USPS. The USPS, however, argued that it was not a "party" to the action as required under Fed. R. Civ. P. 45. *Id.* at 1330 n. 49, 1332 n. 52. The district court agreed with the Postal Service's position, stressing its unique position within the government. *Id.* at 1335-36.

Ignoring the gist of its position in other fora, petitioner now argues (Br. at 21) that it should be treated as identical to the United States under the antitrust laws: "If Congress, in enacting the PRA, had intended to subject the Postal Service to statutes that otherwise exclude the United States, such as the antitrust laws, Congress naturally would have been expected at least to provide that the Postal Service is **not** an agency or establishment of the United States." Petitioner's argument glosses over the USPS's designation as an "independent establishment," and other provisions of the PRA, as we will discuss, underscore the USPS's status separate from the United States.

Indeed, despite its arguments in this case, the USPS itself at times has argued that it falls within the statutory term "person," even when the United States cannot. For instance, the Securities Act of 1933, 15 U.S.C. § 77c(a)(2), exempts securities issued by "any person controlled or supervised by and acting as an instrumentality of the Government of the United States." Petitioner argued that it was exempt because it was "designated by 39 U.S.C. § 201 as 'an independent establishment of the Executive Branch of the Government of the United States' and, therefore, comes within the definition of person." *USPS*, SEC No-Action Ltr., 1971 SEC No-Act. LEXIS 2205 (Aug. 27, 1971). Based on the USPS's representations, the chief counsel of the SEC issued a letter recommending no action to the SEC. *Id.* As the USPS argued to the SEC, Congress's intent to create a distinct entity independent of the United States is clear.

2. Authorization to Engage in Commercial Activities

In addition to enhancing USPS's autonomy, Congress in the PRA considerably broadened the authority of the USPS to determine which activities to pursue. Instead of just delivering mail, Congress granted the USPS greater freedom to determine what products to offer and how to market its wares. Congress vested the USPS with the discretion to "provide, establish, change or abolish special **nonpostal** or similar services." 39 U.S.C. § 404(a)(6) (emphasis added).

Under the PRA, the structure of the USPS resembles that of a private corporation, and the Postmaster General has authority analogous to that of a corporate chief executive. *Id.* The list of powers under the PRA reads like the provisions in a corporate charter. Indeed, unlike other federal entities, Congress directed the USPS to be self sustaining – revenues are to be offset against all costs. *Id.* § 2401[9] Congress also adopted the private sector labor-management relations statute, the National Labor Relations Act (NLRA), to govern collective bargaining between labor and management. *Id.* § 1209.[10]

Although petitioner argues (Br. at 24-25) that Congress's decision not to designate the USPS as a government corporation supports its position, whether Congress labeled the USPS a government corporation or an "independent establishment" (albeit with a corporate structure) should not be determinative of whether it is a "person." The PRA establishes an entity that is charged with operating like a business, with its governance and labor management relations modeled upon the practices of

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[9] *See Franchise Tax Board*, 467 U.S. at 520 n.13.

[10] *See* Ann Marie Hauck Walsh, *The Public's Business: The Politics and Practices of Government Corporations* 35 (MIT Press 1978) (The USPS was the "[f]irst federal agency whose employment policies are governed by collective bargaining").

its private counterparts. As the General Counsel for the USPS, shortly after the PRA's enactment, stressed:

> although officially designated as 'independent establishment' it is clear that Congress intended the Postal Service to operate, in many respects, in the same manner as a corporate entity . . . substantially the same corporate characteristics are vested in the Postal Service as an 'independent establishment' as would have been available to it as a government corporation.

USPS, SEC No-Action Ltr., 1971 SEC No-Act. LEXIS 2205. Indeed, the Postal Service argued, and the Treasury Department agreed, that it should be included within the term "corporation" under the 1934 Securities Exchange Act, 15 U.S.C. § 78c(a)(12). *Id.*; *see also* 36 Fed. Reg. 21,365 (1971) (Treasury Department designation).[11]

As a consequence, and without direction from Congress, the USPS has launched an array of new products. It not only competes with entities such as United Parcel Service (UPS) and Federal Express for express mail, it also has marketed online billing services, phone cards, and greeting cards. President's Commission on the United States Postal Service, *Embracing the Future* 27 (July 31, 2003). The USPS's use of www.usps.com is emblematic of the commercial focus. As this Court recognized in *Loeffler v. Frank*, 486 U.S. 549 (1988), Congress has given the USPS the "status of a private commercial enterprise." 486 U.S. at 558 (citation omitted).

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[11] As John Tierney, whom petitioner cites extensively (Br. at 11, 12, 13, 26), summarized: "The architects of the reorganization believed that the mail delivery system was essentially a business operation that could be managed more efficiently and effectively if it were converted from an old-line cabinet agency to a government corporation." John T. Tierney, *Postal Reorganization* 1 (Auburn Press 1981). *See also* Walsh, *supra* note 10, at 35 (characterizing USPS as a government corporation).

Congress's decision to direct the USPS to carry out commercial activities complements that entity's comparative administrative independence. Congress created an independent establishment to compete in the commercial world.

3. Release From Government-Wide Administrative Constraints

Governmental entities typically are constrained by a welter of political checks, including congressional oversight, executive appointment and removal, notice-and-comment rulemaking, executive orders, and the like. Congress creates government corporations and "independent establishments" to free governmental entities from at least some of such constraints and facilitate greater market-based behavior. This Court has explained in a similar context that

> [a]n important, if not the chief, reason for employing a corporate agency was to enable the Government to employ commercial methods and to conduct the operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure and with it control over the financial operations of the United States.

United States Shipping Board Emergency Fleet Corp. v. Western Union, 275 U.S. 415, 423 (1928).

Under the PRA, Congress specified in Section 410(a) that "[e]xcept as provided," no generally applicable federal laws addressing "public or federal contracts, property, works" etc. apply to the exercise of power by the USPS. Section 410(a) is pivotal – in one plain step Congress placed the USPS outside the very framework governing nearly all other federal governmental entities. Congress's intent to free the USPS from many government-wide rules and regulations could not be more clear. *See Air Courier Conference of America v. APWU*, 498 U.S. 517, 512 (1991) (noting import of § 410(a) in placing

USPS outside of government-wide regulations); *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1084 (Fed. Cir. 2001) (same).

In subsection (b), Congress provided a list of statutes regulating the federal government that it wished to apply to the Postal Service. For instance, that subsection directs the USPS to comply with the Freedom of Information Act and the Privacy Act, among others.

With the exception of the statutes listed in Section 410(b), the PRA thus released the USPS from fundamental laws and regulations governing most governmental entities. For instance, the Administrative Procedure Act does not apply and therefore cannot constrain the USPS's choice of whether to sell calling cards or whether to sponsor Lance Armstrong's professional cycling team. Moreover, Congress in the PRA declined to mandate that the USPS comply with the same procurement laws widely applicable to other federal entities. As the recent Presidential Task Force summarized, "The 1970 Act appropriately grants the Postal Service latitude to conduct its procurement with fewer substantial regulations and statutes than those governing Federal purchasing generally." *Embracing the Future*, *supra*, at 95. Yet, as a result, the USPS need not adhere to the competitive principles embedded in the Federal Acquisition Regulations (FAR). Finally, for rate adjustments in the transport of mail, the USPS must apply to the watchdog agency, the Postal Rate Commission. 39 U.S.C. § 3601(a). But, for other commercial initiatives, it is on its own. The GAO has confirmed that the Postal Service's new commercial offerings "are not subject to the same regulatory scrutiny by the Postal Rate Commission (PRC) that postal activities currently face." GAO Rep. No. 03-812 *U.S. Postal Service: Key Political Transformation Issues* 6 (July 13, 2003). Congress through the PRA therefore created a distinct entity subject to different political and regulatory checks than

governmental entities more generally.

4. Enactment of the Sue-and-Be-Sued Clause

Congress in 1970 waived the Postal Service's immunity from suit, providing the USPS with the power "to sue and be sued in its official name." 39 U.S.C. § 401(1). The repeal of immunity in Section 401(1) represents a key aspect of Congress's effort to instill in the Postal Service a different character, and reflects its view that the USPS is a distinct person.

The USPS evidently is convinced that Congress vested it with greater entrepreneurial freedom with few strings attached. It all but ignores the fundamental tradeoffs in the PRA – "greater bureaucratic independence" in exchange for greater amenability to suit. The sue-and-be-sued clause must be read in conjunction with Congress's decision to make the USPS far more independent and launch it into the commercial world. Given that the Administrative Procedure Act (APA) and the federal procurement (among other) regulations do not apply, Congress intended that the USPS be subject to private litigation to restrain wrongdoing. As this Court stated in *Franchise Tax Board*, 467 U.S. at 520, "we must presume that the Service's liability is the same as that of any other business."[12]

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[12] Such waivers can benefit the newly created entities by encouraging private entities to contract with federal entities at reasonable prices. As a treatise explained some seventy-five years ago, "If the immunity of the government from suit without its consent were extended to government corporations engaged in economic enterprises, not only would much injustice result, but the activity of the corporation would be hindered, on the one hand because those who were expected to do business with the corporation would be suspicious of making engagements with it if they were uncertain whether these engagements could be enforced, and on the other because the corporation itself would not know what its rights and obligations were." John Thurston, *Government Proprietary Corporations in the English-Speaking Countries* 43-44 (Harvard U. Press 1937).

In addressing Congress's waiver under the PRA, this Court's opinion in *Franchise Tax Board* strongly supports the decision below. There, this Court held that Congress had waived the USPS's immunity from state administrative orders to withhold monies that its employees owed to the state taxing authority. The USPS had argued, much as in this case, that it did not fall within the term "person" under the California Unemployment Insurance Code – "the term 'person' generally does not refer to the United States or its agencies because the statutory term 'person' generally does not refer to sovereigns." Brief for the USPS at 47-48, *Franchise Tax Board v. USPS*, 698 F.2d 1029 (9th Cir. 1980) (No. 80-5700). The court of appeals rejected the argument, 698 F.2d at 1032, and this Court held that imposing the state law obligation on the USPS furthered congressional intent that the USPS be treated like a private entity. Citing *FHA v. Burr*, 309 U.S. 242 (1940), this Court explained that "we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. . . [W]hen Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." 467 U.S. at 517-18. Congress's waiver presumptively subjected the USPS to liability under the generally worded statutory scheme that included the garnishment order in the case.

Moreover, Congress under the PRA attached specific conditions to the waiver of immunity for the USPS. These provisions show that Congress considered the ramifications of waiving the USPS's immunity, and yet included no mention of the antitrust laws. For instance, Section 409(b) provides that "the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States" is involved should also apply in suits against the

USPS despite the general waiver. Congress took care to protect the USPS by ensuring that favorable statutes of limitation should apply, and that it be protected from suit in unfavorable fora.

In addition, Congress provided in Section 409(a) that "United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28." Thus, Congress made sure that, despite the waiver of immunity, the USPS – unlike Federal Express or UPS – could remove any case filed in state court to federal court.

Furthermore, in Section 409(c) Congress directed that the tort claims brought against the Postal Service conform with the procedures and limitations set out under the Federal Tort Claims Act. Congress therefore exempted the USPS from jury trials in tort cases and imposed an exhaustion of remedies requirement, which the court below relied on in this case. Pet App. 15a-16a. Moreover, by limiting the waiver, Congress ensured that all allegedly tortious acts stemming from the "discretionary functions" of USPS officials would also be protected. Congress therefore was careful to carve out explicit exceptions to protect the USPS even while waiving its immunity. In light of the special rules governing venue, tort claims, and the like, the lack of any reference to the federal antitrust laws strongly suggests that no such limitation to the general waiver was intended. Congress made plain the contexts in which the Postal Service was to be treated differently than private entities.

This Court's decision in *Loeffler* reinforces that conclusion. There, in upholding an award of pre-judgment interest against the Postal Service in a Title VII case, the Court stressed the significance of the conditions that Congress had attached to the

sue-and-be-sued clause to limit the USPS's liability. *Id.* at 561-62. According to the Court, the presence of the specific limitations indicate that a court should not of its own accord imply any other limitation. *Id.* at 557. The Court summarized: By "including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of immunity' and given it the 'status of a private commercial enterprise.'" *Id.* at 556.[13] Thus, the Court was persuaded by the PRA that Congress intended the USPS to be treated akin to a private sector entity and not the United States for purposes of Title VII.

Moreover, petitioner's brief ignores rulings by lower courts in settings similar to the federal antitrust laws that have held that the USPS can be sued under congressionally created causes of action exposing "persons" to liability. For instance, in *Global Mail Ltd. v. United States Postal Service*, 142 F.3d 208 (4th Cir. 1998), the USPS argued, much as it does here in the context of the antitrust laws, that the Lanham Act did not reach the USPS's conduct. At that time, the Lanham Act authorized suit against all "persons" including "organizations capable of being sued," 15 U.S.C. § 1127,[14] and permitted treble damages. 15 U.S.C. § 1117(a). The USPS asserted that the Lanham Act

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[13] As this Court more recently stated in *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992): "We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in . . . the context of equally broad 'sued and be sued' clauses." In other words, in the sue and be sued context, this Court has assumed that such waivers are intended to be broad, limited only by the explicit exceptions. The exceptions under the PRA do not limit suits under the federal antitrust laws.

[14] The Lanham Act since has been amended to include the United States specifically within the terms of the statute, 15 U.S.C. § 1127, and suit for treble damages is still authorized. Petitioner's citation (Br. at 9) to the Lanham Act reflects the amended version.

did not allow suit against it because it did not fall within the term "person" and because "the Act's definition of 'person' as an organization capable of being sued falls short of the standard of explicitness required for such a waiver." *Id.* at 216.

The court of appeals rejected the argument, reasoning that "a federal agency whose sovereign immunity has been waived... [and is] engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'" *Id.* The Sixth Circuit subsequently agreed with the reasoning in *Global Mail* , adding that "[w]e cannot conclude that Congress intended § 409 simultaneously to launch USPS into the commercial world and also to immunize USPS from liability for federally-created commercial torts such as the Lanham Act." *Federal Express Corp. v. United States Postal Service*, 151 F.3d 536, 546 (6th Cir. 1998) (citations omitted). *See* also *United States v. Q International Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997) (similarly holding that USPS is a "person" under the Lanham Act). Pursuant to the PRA waiver, Congress intended to subject the USPS to the same rules of the game played by its competitors.

Indeed, the USPS has acted as a "person" under federal statutes, seeking protection under the Lanham Act for trademarks asserted in its own name. *See* U.S. Patent Office, "Trademark Electronic Search Systems" database (Sept. 10, 2003) (search for registered marks where United States Postal Service is listed as owner yielded 464 results, including one filed in 1972), http://www.uspto.gov/main/trademarks.htm. Thus, when to its advantage, the USPS has no quarrel with its characterization as a "person" under generally worded federal statutes. As the *Federal Express* court noted, "Despite its assertion that it is not a Lanham Act 'person' when it is accused of overstepping the confines of that Act, USPS has, in other contexts, been quick to behave as a Lanham Act 'person' in protection of its perceived rights under that enactment.

Rudimentary notions of justice and fair play reinforce the conclusion, already amply supported by the plain language of the operative statutes, legislative history, and judicial interpretations" that Congress intended the USPS to be a "person" under the Lanham Act. 151 F.3d at 546.

Petitioner's arguments in this case cannot be squared with the reasoning in the above decisions from the Fourth, Sixth and Eighth Circuits. Courts have distinguished between the United States and the USPS,[15] concluding that Congress's waiver under the PRA was intended to expose the Postal Service to liability under a variety of causes of action for its activities in the commercial sector in contexts in which the United States would not be liable. Petitioner has offered no other purpose for the waiver.

Petitioner suggests (Br. at 19) that, in light of *FDIC v. Meyer*, 510 U.S. 480 (1994), the significance of the sue-and-be-sued clause is limited to waiving sovereign immunity, and it does not provide any indication that USPS is a person under antitrust laws. Petitioner misreads *Meyer*.

In *Meyer*, although this Court agreed that Congress had waived the general immunity of the Federal Savings and Loan Insurance Company (FSLIC), a governmental instrumentality, the particular cause of action asserted in that case – a constitutional tort under *Bivens* – did not permit a route to sue. This Court had never intended that the *Bivens* route be used against governmental entities as opposed to governmental officials, whether or not the agencies retained immunity. *Id.* at 484-85. Nor were constitutional tort actions available against

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[15] Courts had held that the United States, in contrast to the Postal Service, did not fall within the statutory definition of "person" under the Lanham Act. *See Preferred Risk Mutual Insurance Co. v. United States*, 86 F.3d 789 (8th Cir. 1996). Courts thus differentiated the United States from the Postal Service for purposes of defining "person."

private entities. Thus, no cause of action against FSLIC could lie.[16] *Meyer* in no way signaled that Congress must specifically list a governmental entity whose immunity has been waived as a defendant before permitting suit to proceed.

Rather, when Congress waives the immunity of a federal governmental entity, courts must inquire whether Congress intended the entity, despite the waiver, to be exempt from a generally applicable cause of action. Prior to the PRA Congress and states passed a multitude of statutes imposing responsibilities and liabilities on individuals, corporations, and other entities. Some, like the federal antitrust laws, the Lanham

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[16] The court below recognized *Meyer*'s "two-step inquiry in analyzing whether a federal instrumentality enjoys immunity from a particular substantive area of the law." Under this analysis, "'[t]he first inquiry is whether there has been a waiver of sovereign immunity.' If there has been, 'the second inquiry . . [is] whether the source of substantive law upon which the claimant relies provides an avenue for relief.'" Pet. App. 4a. Following *Meyer*, the court initially determined that the PRA waived the Postal Service's immunity from suit, as the Postal Service recognizes as well. Pet. App. 5a. Second, "[h]aving determined that Congress has waived the Postal Service's immunity, we turn to the second inquiry. . . . The source of substantive law upon which Flamingo relies is federal antitrust law." Pet App. 8a. Thus, petitioner's assertion (Br. at 19) that "the Ninth Circuit below did not undertake to determine whether there was an independent substantive basis under the antitrust laws for imposing liability against the Postal Service" blinks reality. The court below concluded that the USPS fell within the statutory definition of "person," "[b]ecause the Postal Service is an entity with the status of a private commercial enterprise. . . . akin to a private corporation." Pet App. 11a, 13a. To the court, although "person" did not include the United States as sovereign, the USPS as a sue-and-be-sued entity "fits within the common meaning of the word "person" just as does any other private corporation." Pet. App. 11a.

Act, and RICO[17] direct that all "persons" be liable, including corporations and associations organized under the laws of the United States. Similarly, the California Unemployment Insurance Code imposes obligations on "persons," as does the Federal Communications Act.[18] In enacting the broad waiver in the PRA, it would have been impracticable for Congress to consider every possible cause of action to list whether the USPS should be subject to suit in each one. If there is no applicable cause of action, as in *Meyer*, then no liability should lie. However, "when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *FHA v. Burr* , 309 U.S. at 245. Given Congress's determination to make the Postal Service independent and launch it into the commercial world, and given that Congress carved out specific exceptions not including the antitrust laws from the waiver of immunity, Congress intended that the USPS be subject to suit as a "person" under the federal antitrust

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[17] *See Miller v. Gould*, 1990 U.S. Dist LEXIS 5934 (N.D. Ill. 1990) (holding that USPS is a "person" within meaning of RICO).

[18] The FCC in *In re Graphnet Systems, Inc.*, 73 F.C.C.2d 283 (1979), No. 79-2243 (D.C. Cir. Oct. 14, 1980), *vacated as moot sub nom. United States Postal Serv. v. FCC*, No. 79-2243 (D.C. Cir. Oct. 14, 1980), held that the Postal Service fell within the term "person" under its statutory scheme, which was defined to include "an individual, partnership, association, joint -stock company, trust or corporation." 47 U.S.C. § 153(i). Citing *Cooper*, the Commission explored the underlying intent of both its Act and the PRA, and concluded that the Postal Service should be construed as a "person" because the "non-governmental nature of the Postal Service's activities is especially apparent when it engages in competition with private enterprise." *Id.* at 292.

laws.[19]

Finally, in light of Congress's overall intent to create parity between the USPS and other businesses, it would be incongruous to conclude that Congress wished to launch the Postal Service into competition with entities such as Federal Express or UPS with respect to express mail and other services and yet immunize the USPS from the same antitrust constraints that promote competition amongst its competitors. Nor is it likely that the USPS's liability would be "the same as that of any other business," *Franchise Tax Board*, 467 U.S. at 520, if it could conspire to set prices or engage in other means of restraining competition without fear of the antitrust laws. [20] Thus, this Court's admonition in *Franchise Tax Board* that "we believe Congress intended the Postal Service to be treated similarly to other self-sustaining commercial ventures," 467 U.S. at 525, strongly supports inclusion of petitioner as a "person" under the federal antitrust laws.

C. Recognizing That The USPS Is A "Person" Under The Antitrust Laws Does Not Preclude Immunity For USPS Actions Directed By Congress

The court below recognized that some USPS activities are governed by specific congressional directives, such as the

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[19] *See also Pennsylvania Dep't of Environmental Resources v. USPS*, 13 F.3d 62 (3d Cir. 1993) (holding that the USPS, unlike the United States, can be sued for steep penalties under the Clean Water Act in light of the USPS's distinct structure and functions).

[20] The FCC determined that the Postal Service was "a proprietary enterprise which, like other government-owned entities that have been found subject to regulation, has been organized in a form similar to commercial ventures, and its unregulated entry into a competitive marketplace could seriously jeopardize achievement of the goals embodied in the Communications Act." 73 F.C.C. 2d at 297.

mandate that USPS exercise a monopoly over the carriage of U.S. letter mail. 39 U.S.C. § 201(a). As a consequence, the court provided that the Postal Service as a "person" under the antitrust laws would continue to be protected by a "conduct-based immunity." Pet. App. 13a. According to the court, the USPS cannot be sued under the antitrust laws for carrying out its legislative mandate, but only for acts unconnected to the legislative will that are anti-competitive. When the USPS exercises a monopoly conferred upon it by Congress, no liability can lie. However, if the USPS without congressional authorization conspires with another company to hold down prices paid to suppliers, creates an illegal tying arrangement, or conspires to prevent competition in production of mail sacks, then no immunity would attach.[21] Liability in such contexts would protect the public and further Congress's goal in the PRA to make the USPS more efficient.

Petitioner argues nonetheless (Br. at 28-29) that the conduct-based immunity might be too porous to protect the USPS's interests. Yet, this Court has recognized the salience of the conduct/status distinction in the closely related setting of antitrust suits against state governmental entities.

Under the so-termed state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), this Court has held that the conduct of state agencies directed by state legislatures is exempt from the federal antitrust laws. In that case, decided two years after *Cooper*, a California raisin producer sued state officials for

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[21] Petitioner asserts (Br. at 29) that antitrust immunity might interfere with the Postal Service's discretion in procurement. Congress has not determined that monoplistic procurement practices are vital to any congressional goal. To the contrary, Congress's enactment of the Robinson-Patman Act evinces its recognition of the antitrust evils that arise from price discrimination. *See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983) (applying Clayton Act to state entities' purchase of goods).

implementing a state-wide program that limited raisin production in order to stabilize prices across the state. This Court did not hold that the state defendants fell outside the Act's definition of "person"; rather it held that Congress never intended the antitrust laws to restrain a "state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. Given that the raisin program "derived its authority and its efficacy from the legislative command of the state," no antitrust liability could attach. *Id.* at 350. Thus, when a state agency acts at the direction or command of the legislature, it is immune from the reach of the antitrust laws. Governmental entities can be immune from antitrust liability for some actions yet subject to suit for others.

When a state agency or political subdivision acts outside of legislative direction, the *Parker v. Brown* doctrine is no impediment to suit. For instance, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court followed *Parker v. Brown* in holding that an antitrust action could proceed against a state agency when the agency was not acting pursuant to the "legislative command" of the state. An attorney had sued the Virginia State Bar under the antitrust laws, challenging the agency's decision to set and enforce minimum fee schedules for attorneys. This Court explained that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign." 421 U.S. at 790. The Court concluded that the activities of the state bar in publishing and enforcing the schedules were not "required" by the state and did not derive closely from the legislative command. *Id.* at 791-92.

Participating as amicus in *Goldfarb*, the United States filed a brief urging the result ultimately adopted by this Court. *See* Brief for the United States at 34-48, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (No. 74-70). Moreover, the United

States has sued state agencies for anticompetitive acts not stemming from the "legislative command" of the state.[22] The United States evidently believes that the *Parker v. Brown* defense is sufficient for preserving the legitimate sovereign prerogatives of state agencies.

The Ninth Circuit's embrace of conduct immunity in this case, therefore, follows the doctrine articulated in cases decided under *Parker v. Brown*. State entities that market calling cards or online payment services would still enjoy immunity from antitrust claims where the alleged anti-competitive behavior stemmed from legislative direction, but not for commercial activities unconnected to the legislative will.

The Ninth Circuit's conduct immunity sufficiently safeguards the USPS's sovereign functions and accords with Congress's intent under the PRA. Through its enactment of a statutory monopoly, Congress has exempted the Postal Service from antitrust scrutiny for such acts. But, for commercial actions unconnected to the legislative monopoly, there is no legislative intent to preclude antitrust review.[23] Indeed, review of such commercial actions – as for state entities – comports with Congress's design in creating the USPS as an independent commercial entity that can sue and be sued in its own name.

Petitioner complains (Br. at 27-28), however, that application

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[22] As then Judge Breyer noted in *FTC v. Monahan*, 832 F.2d 688 (1st Cir. 1987), "a subordinate governmental unit enjoys antitrust 'immunity' only when it acts pursuant to a 'clearly articulated and affirmative expressed' state policy."

[23] The availability of treble damages does not dictate a different conclusion. This Court stated in *Cook County, Illinois v. United States ex. rel. Chandler*, 123 S. Ct. 1239, 1246 (2003), "it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives." As discussed previously, treble damages are available under the Lanham Act.

of the antitrust laws will result in greater cost to the consumer because of the litigation spawned. The same could be said for applying the antitrust laws to UPS and Federal Express. Ultimately, those entities may pass on the costs of litigation to consumers as well. But Congress has determined that any such costs are acceptable because, in the long run, deterrence of anticompetitive behavior will **lower** prices for consumers and enhance choice. As this Court has stated, "The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain . . . are favorably affected by the opportunity to select among alternative offers." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978). Any hostility to the antitrust laws should be directed to Congress, not this Court.[24]

Indeed, although the USPS predicts dire consequences from facing antitrust suits for its proprietary acts unconnected to Congress's command, Congress has determined that foreign governmental entities should be subject to suit under similar circumstances and, indeed, even when their commercial acts stem from a foreign government's legislative command. Under Section 1605(a)(2) of the Foreign Sovereign Immunities Act

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[24] Petitioner also suggests (Br. at 29-32) that any anticompetive acts can be rooted out in a procurement action. Petitioner's assertion suffers from two fundamental defects. First, many anticompetitive acts arise outside the procurement context and thus a procurement challenge could not remedy any such violations. Second, the procurement laws are aimed at preventing violations of procurement regulations – such as those that were at stake in the two cases cited by petitioner (Br. at 32) that were ultimately settled. They do not restrain all anticompetitive acts arising out of procurements, and Congress's very determination that the Postal Service need not follow the FAR reinforces the narrowness of any procurement remedy.

(FSIA) of 1976, injured parties can sue foreign governmental entities if they can demonstrate that the entity's conduct "is based upon a commercial activity carried in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a foreign state elsewhere and that act causes a direct effect in the United States." Congress defined "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Courts must therefore distinguish between commercial and sovereign acts in applying the FSIA.

For instance, in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the question presented was whether Argentina's default on bonds was an act taken "in connection with a commercial activity" and thus subject to suit in the United States. This Court agreed with the United States as *amicus* that issuance of the bonds constituted a commercial activity, and that because the rescheduling had a direct effect in the United States, Argentina could be sued. *Id.* at 619-20.

Under the FSIA, foreign postal services unquestionably can be sued for "commercial activities" in this country. Private firms presumably could sue the British Post Office, for instance, if it attempted to monopolize the express mail or calling card industry, but not for those acts closely related to a sovereign function.[25] Congress has determined that foreign governmental

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[25] Moreover, other nations subject their own governmental or quasi-governmental entities operating postal services to antitrust standards. *See United States Postal Service Reform: The International Experience:*

entities should only be protected in the exercise of their sovereign activities – as a policy matter, it deemed no further immunity necessary or appropriate.

Petitioner nevertheless suggests that subjecting the Postal Service in this country to antitrust liability would violate public policy, despite Congress's determination to permit suit against comparable foreign governmental entities. Its assertion in this case flies in the face of prior expressions of policy by members of the administration. The Department of Justice has recognized that the antitrust laws as currently constituted likely cover the USPS, and even the USPS has previously gone on record as supporting liability.

For instance, a 1977 presidential task force headed by Assistant Attorney General Thomas Kauper, Chief of the DOJ Antitrust Division, concluded – much as did the court below – that governmental enterprises acting in a commercial or proprietary capacity **should** be subject to the antitrust laws. The task force stated that "If the activity is 'political,' it should be exempt without regard to corporate form. However, if the activity is 'commercial,' the enterprise ought to be subject to ordinary commercial rules, including the antitrust laws." Further, it stressed that "[t]he mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws." Rather, "the commercial

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Hearing Before the Subcomm. on the Post Office and Civil Service of the Senate Comm. on Governmental Affairs, 104th Cong., 2d Sess. 183, 201, 227, 232, 242 (1996) (describing antitrust standards governing postal authorities in Australia, Canada, Denmark, France, Germany, New Zealand, and Sweden). Indeed, the Postal Service is subject to the antitrust laws of foreign nations. *See H.R. 3737, The Postal Reform Act of 1996: Hearings Before the Subcomm. on the Postal Serv. Of the House Comm. On Government Reform*, 104th Cong., 1st Sess. 879 (1996).

activities of a state-owned enterprise [should be held] to the same standards requiring (sic) of all who engage in commercial transactions in the market." *Antitrust Exemptions and Immunities, Hearing Before the Subcomm. On Monopolies and Commercial Law of the House Comm. On the Judiciary*, 95th Cong., 1st Sess 1890-91 (March 29, 1977).[26]

With respect to the USPS in particular, the Task Force suggested that antitrust immunity should attach as long as Congress "legislatively protected the enterprise from competition." *Id.* at 1891. Thus, no antitrust liability should exist for conduct arising from congressional direction. To the task force, the key question was whether "the enterprise is commanded by the state to undertake certain activity," a test borrowed from the *Parker v. Brown* context. *Id.* at 1889-90. This presidential Task Force therefore concluded that the nation would benefit from application of the antitrust laws to government enterprises such as the USPS. Although the Task Force's analysis sheds no light on the statutory interpretation question, as a policy matter it undercuts petitioner's assumption that this antitrust suit would not serve the public interest.

In the aftermath of the report, the Department of Justice publicly asserted that "while the point is by no means unarguable, neither the case law nor sound public policy would indicate that the Postal Service enjoys any comprehensive 'sovereign immunity' from the antitrust laws." The DOJ filed this document in response to a request for legal memoranda by the Postal Rate Commission on whether the USPS was subject to the antitrust laws. The DOJ stressed that, apart from the USPS's statutory monopoly, there is no reason why "even a lawful monopolist" should be exempt from "antitrust constraints when it seeks to extend or exploits its monopoly in

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[26] This Court cited the study with evident approval in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983).

a manner not contemplated by its authorization." *Comments of the U.S. Department of Justice* (Dec. 6, 1978), Docket No. MC78-3, at 34 (Postal Rate Comm'n).

Moreover, the Department of Justice supported a legislative proposal to clarify the USPS's amenability to the antitrust laws in 1999. *H.R. 22, The Postal Modernization Act of 1999: Hearings Before the Subcomm. On the Postal Serv. of the House Comm. On Government Reform*, 106th Cong., 1st Sess. 332-33 (1999). The Deputy Assistant Attorney General of the Antitrust Division addressed the benefits of permitting antitrust suits against the Postal Service: "The direct goal of an antitrust enforcement action is to stop anticompetitive agreements and monopolistic conduct that interfere with the healthy competitive functioning of the marketplace. Consumers benefit when market dynamics reflect a competitive situation . . . [A]ntitrust enforcement provides a highly effective deterrent against unreasonable restraints of trade without resort to a more intrusive regime of government oversight, thus benefitting postal consumers, and the general public alike." *Id.* at 332. Moreover, in response to the USPS's fear of a flood of lawsuits, the DOJ official stated that "This is a concern of all firms to which the antitrust laws apply. It bears full consideration only if there is a demonstrable policy justification for shielding the USPS non-monopoly activities from antitrust scrutiny. As a general rule, we disfavor exemptions or protections that set one class of competitors apart from others under the law." *Id.* at 332-33.

Indeed, the USPS echoed the policy views of the Department of Justice in supporting a legislative proposal in 2002 that would have made clear its exposure to antitrust liability. *See* Postal Service Board of Governors Announces Support for Postal Reform Legislation, Press Release, 02-048 (June 4,

2002), http://ribbs.usps.gov.[27] The proposed legislation provided that the USPS "shall be considered a person" for purposes of "the antitrust laws" when it "engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18."

Petitioner's protestations to the contrary, government officials have themselves advocated and/or anticipated that the USPS be subject to antitrust laws. Thus, although one might think from reading petitioner's brief that imposing antitrust liability on the USPS is unimaginable, administration officials ever since the passage of the PRA not only have imagined it, they have supported liability in order to protect the public.

In short, the court of appeals below persuasively concluded that Congress intended that the USPS be amenable to suit under the federal antitrust laws for its commercial acts, just like its competitors here and abroad. Congress's expansive definition of "person" under the antitrust laws, Congress's broad waiver of the USPS's immunity under the PRA, and Congress's underlying pro-competitive policy all demonstrate that Congress intended the USPS's commercial activities to be subject to antitrust scrutiny.

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[27] As one participant noted when supporting an earlier version of the bill, although "there is compelling legal precedent to support the proposition that the Postal Service is already subject to the antitrust laws," the bill would bridge 'the chasm between the legal reality, on the one hand, and the perception, myth and conduct of the Postal Service on the other." *H.R. 3737, The Postal Reform Act of 1996: Hearings Before the Subcomm. On the Postal Serv. Of the House Comm. On Government Reform*, 104th Cong. 1st Sess. 912 (1996) (statement of the Air Courier Conference of America).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted.

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SEPTEMBER 2003

STATUTORY APPENDIX

THE FEDERAL ANTITRUST LAWS: Relevant Provisions

15 U.S.C. § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 7. The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 9. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of section 8 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

15 U.S.C. § 12. The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 13(a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where

either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them[.]

15 U.S.C. § 15(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

THE POSTAL REORGANIZATION ACT

29 U.S.C. § 201. There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.

29 U.S.C. § 202(a). The exercise of the power of the Postal Service shall be directed by a Board of Governors composed of 11 members appointed in accordance with this section. Nine of the members, to be known as Governors, shall be appointed by the President, by and with the advice and consent of the Senate, not more than 5 of whom may be adherents of the same political party. The Governors shall elect a Chairman from among the members of the Board. The Governors shall be chosen to represent the public interest generally, and shall not be representatives of specific interests using the Postal Service, and may be removed only for cause. Each Governor shall

receive a salary of $30,000 a year plus $300 a day for not more than 42 days of meetings each year and shall be reimbursed for travel and reasonable expenses incurred in attending meetings of the Board. Nothing in the preceding sentence shall be construed to limit the number of days of meetings each year to 42 days.

(b) The terms of the 9 Governors shall be 9 years, except that the terms of the 9 Governors first taking office shall expire as designated by the President at the time of appointment, 1 at the end of 1 year, 1 at the end of 2 years, 1 at the end of 3 years, 1 at the end of 4 years, 1 at the end of 5 years, 1 at the end of 6 years, 1 at the end of 7 years, 1 at the end of 8 years, and 1 at the end of 9 years, following the appointment of the first of them. Any Governor appointed to fill a vacancy before the expiration of the term for which his predecessor was appointed shall serve for the remainder of such term. A Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.

(c) The Governors shall appoint and shall have the power to remove the Postmaster General, who shall be a voting member of the Board. His pay and term of service shall be fixed by the Governors.

(d) The Governors and the Postmaster General shall appoint and shall have the power to remove the Deputy Postmaster General, who shall be a voting member of the Board. His term of service shall be fixed by the Governors and the Postmaster General and his pay by the Governors.

39 U.S.C. § 203. The chief executive officer of the Postal Service is the Postmaster General appointed under section 202(c) of this title. The alternate chief executive officer of the

Postal Service is the Deputy Postmaster General appointed under section 202(d) of this title.

39 U.S.C. § 401. The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents, except as otherwise provided in this title;

(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title;

(7) to accept gifts or donations of services or property, real or personal, as it deems, necessary or convenient in the transaction of its business;

(8) to settle and compromise claims by or against it;

(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

39 U.S.C. § 409

(a) Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28.

(b) Unless otherwise provided in this title, the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, and the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising

out of activities of the Postal Service.

39 U.S.C. § 410

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) section 552 (public information), section 552a (records about individuals), section 552b (open meetings), section 3102 (employment of personal assistants for blind, deaf, or otherwise handicapped employees), section 3110 (restrictions on employment of relatives), section 3333 and chapters 72 (antidiscrimination; right to petition Congress) and 73 (suitability, security, and conduct of employees), and section 5520 (withholding city income or employment taxes), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or section shall apply to the Postal Service unless expressly made applicable;

(2) all provisions of title 18 dealing with the Postal Service, the mails, and officers or employees of the Government of the United States;

(3) section 107 of title 20 (known as the Randolph-Sheppard Act, relating to vending machines operated by the

blind);

(4) the following provisions of title 40:

(A) sections 3114-3116, 3118, 3131, 3133, and 3141-3147; and

(B) chapters 37 and 173;

(5) the following provisions of title 41:

(A) sections 35-45 (known as the Walsh-Healey Act, relating to wages and hours); and

(B) chapter 6 (the Service Contract Act of 1965);

(6) sections 2000d, 2000d-1–2000d-4 of title 42 (title VI, the Civil Rights Act of 1964);

(7) section 19 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 668);

(8) the provisions of the Act of August 12, 1968 (42 U.S.C. 4151-4156);

(9) chapter 39 of title 31;

(10) the Inspector General Act of 1978; and

(11) section 5520a of title 5.